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In the
Supreme Court of the State of Utah

FILED

STATE OF UTAH, by and through its
ROAD COMMISSION,
Plaintiff and Appellant,

vs.

DENVER AND RIO GRANDE WEST-
ERN RAILROAD COMPANY, a Del-
aware corporation,
Defendant and Respondent.

JUL 21 1958

Clerk, Supreme Court, Utah

Case No.
8754

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BRIEF OF RESPONDENT

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ARROW PRESS, SALT LAKE

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The parties will sometimes be designated in this brief as follows: Plaintiff and Appellant, State of Utah, by and through its Road Commission, as the "Road Commission", Defendant and Respondent, Denver and Rio Grande Western Railroad Company, as the "Rio Grande". Emphasis has been supplied.

STATEMENT OF THE CASE

This appeal involves a very narrow question. The problem is simply whether the trial court erred in denying the application of the Road Commission, on summary motion to occupy and thereby to seize and destroy Rio Grande's Little Cottonwood Branch of railroad. The trial court has never considered or determined the ultimate rights of the parties. The issues to be resolved in determining those rights must await the trial of the case. The court below simply refused, under the showing made on the preliminary motion, to authorize the Road Commission immediately to occupy the premises sought to be condemned. In this we believe the trial court acted with manifest propriety.

STATEMENT OF FACTS

While there is no substantial issue of fact, we believe the statement as presented by counsel for the Road Commission does not sufficiently advise the court of the essential facts involved. For this reason, respondent presents the following statement of facts.

Rio Grande is a common carrier of persons and property by rail in intrastate and interstate commerce. Its main line of railroad from Salt Lake City to Colorado points runs in a north and south direction generally along the center of the Salt Lake Valley. In the City of Midvale this main line crosses at grade an east and west street known as Center Street. Near the point of this crossing two branch lines of Rio Grande's railroad are taken out from its main line (Exhibit P-1).

One of these branches known as the "Little Cottonwood Branch" is taken out of the main line immediately south of Center Street and runs in an easterly direction abutting the south side of Center Street on premises owned in fee by Rio Grande a distance of some 3,000 feet and then extends southerly crossing State Street and serving industries on the east side of State Street. This branch line extends approximately 1.75 miles and has approximately .43 miles of side tracks. It had for the year 1957 an assessed valuation of \$6,525.00. This branch line presently serves directly an oil company and a coal company, and through a team track a rock wool company and a builders supply company. The oil company and the coal company produced approximately \$21,500.00 in gross freight revenue in 1956. The companies served by the team track produced some ten cars of freight in the same period (R. 28, 36, 82-83).

Taking out of said main line immediately north of Center Street, Rio Grande has another branch line known as the "Bingham and Garfield Branch", which runs westerly down Center Street of Midvale and serves mines and industries in the Bingham and Garfield area (R. 77).

Center Street is a road designated by statute as a part of the State Road System and is under the jurisdiction of the State Road Commission. The right of way owned in fee by Rio Grande for its Little Cottonwood Branch is approximately 27 feet in width and abuts along and runs parallel to the south side of Center Street for a distance of approximately 3,000 feet. Abutting upon the south side of such right of way are residential properties owned by residents of the City of Midvale (Exhibit P-1). The tracks

of Rio Grande on its Little Cottonwood Branch are elevated above the street level of Center Street some 6 to 13 inches (R. 46). The Road Commission, Midvale City and Rio Grande have since 1954 been considering a plan for the improvement of Center Street from the point where it crosses Rio Grande's main line easterly to State Street, whereby the tracks of Rio Grande on this branch would be lowered, and the entire area paved over and used as part of Center Street. After considerable negotiation the form of agreement for carrying out such plan was approved by the Road Commission and on January 10, 1957, transmitted to Rio Grande for execution. Rio Grande executed the same and transmitted it to the Road Commission on July 19, 1957. The Road Commission never signed the agreement (Exhibits D-3 through D-11). Prior to transmitting the form of agreement to Rio Grande for the lowering and paving over of its tracks on Center Street, the Road Commission in October or November, 1956, entered into a contract for the improvement of Center Street under Project 1580. The construction under this contract has now been completed. The project for lowering Rio Grande's tracks and paving over has never been carried out although it could be completed in about thirty days time (R. 27, 85).

After having arrived at a basis of agreement with Rio Grande for the lowering of its tracks and the paving over of the track area the Road Commission changed its mind about completing the street project and asserted that the Little Cottonwood Branch should be removed and destroyed in its entirety. This Rio Grande was unwilling to do, and the Road Commission brought this action to

condemn the entire branch. The reason assigned for such change of position on the part of the Road Commission is the Valley Freeway Project No. 1-01-7(3) (R. 41-43).

Project 1-01-7(3) involves the construction of a freeway which will be a part of the interstate road system under the Highway Act of 1956. This freeway will enter Salt Lake City at a point known generally as the Beck's Overpass near the Davis County line and will extend southerly through Salt Lake County. The tentative proposal for location contemplates that this freeway will be easterly of and near Rio Grande's main line at the point where the freeway crosses Center Street (R. 30-31, Exhibit P-1). Three problems require solution in connection with the crossing of the freeway at this point. (a) The nature of the grade separation between Center Street and the freeway must be determined. The present proposal is that Center Street will underpass the freeway (R. 31). (b) The connection of the Bingham and Garfield Branch into Rio Grande's main line must be relocated. Rio Grande and the Road Commission have not yet agreed upon such relocation (R. 77-78, 87-88). (c) A determination must be made respecting the connection of the Little Cottonwood Branch into Rio Grande's main line. The Commission proposes that the entire branch be condemned and destroyed (R. 31).

Although 51% of the right of way in the vicinity of the crossing in question has been secured the entire freeway is still in the planning stage. Interchanges with other highways have not been fully determined and remain subjects of controversy. No construction whatever is now going forward in Salt Lake County on this freeway except for

work on the Beck's Overpass, and no contracts have been let for any such construction. It is estimated that three to five years from date of hearing on the motion will pass before any construction will take place (R. 37-40).

On this state of fact the trial court upon the hearing on the Road Commission's motion made and entered the following finding and order.

"This matter coming on regularly to be heard before the Court on the 24th day of September, 1957, on the motion of plaintiff for an order of immediate occupancy of the premises sought to be condemned in this action and the answer of the defendant to such motion; evidence oral and documentary having been introduced by the parties and the matter having been argued by counsel and submitted to the Court, and the Court being fully advised in the premises now finds that the evidence introduced at said hearing is insufficient to justify the issuance of an order permitting the plaintiff to immediately occupy the premises sought to be condemned pending the action,

"It is therefore ORDERED that said motion be and the same is hereby denied."

Of this finding and order the Road Commission complains.

STATEMENT OF POINTS

POINT I.

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR IMMEDIATE OCCUPANCY.

- (a) Appellant Could Obtain Immediate Occupancy Only Upon Compliance With the Statute.
- (b) The Granting of an Order of Immediate Occupancy Rests in the Sound Discretion of the Trial Court.
- (c) The Trial Court Properly Exercised Its Discretion in Denying Appellant's Motion for Immediate Occupancy.

POINT II.

THE POWER OF APPELLANT TO CONDEMN THE PROPERTY OF RESPONDENT IS NOT AFFECTED BY THE ORDER APPEALED FROM.

ARGUMENT

POINT I.

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR IMMEDIATE OCCUPANCY.

- (a) Appellant Could Obtain Immediate Occupancy Only Upon Compliance With the Statute.

The legislature has conferred upon the Road Commission power to acquire real property or interests therein to be used in the construction, maintenance or operation of

State roads under the provisions of Section 27-2-9, Utah Code Annotated, 1953, as amended by Chapter 43, Laws of Utah, 1955.

The power of the Road Commission to obtain immediate occupancy of the premises pending the action is found in Section 78-34-9, Utah Code Annotated, 1953, which provides as follows:

“78-34-9. Occupancy of premises pending action.—The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the state, or has appeared by attorney in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action, and to do such work thereon as may be required for the easement sought according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the plaintiff to execute and file in court a bond to the defendant with sureties to be approved by the court or judge, in a penal sum to be fixed by the court or judge not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation, as the same may appear to the court or judge on the hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is

condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action. The sureties shall justify before the court or judge after a reasonable notice to the defendant of the time and place of justification. The amounts fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement."

Thus it appears clear that if the Road Commission is entitled to immediate occupancy of the Little Cottonwood Branch of Rio Grande, a showing must be made which will bring it within the authorization of the foregoing statute.

(b) The Granting of an Order of Immediate Occupancy Rests in the Sound Discretion of the Trial Court.

The rule is well established that the issuance of an order of immediate occupancy under a statute such as ours rests in the sound discretion of the trial court. This rule was announced in *Utah Copper Co. v. Montana-Bingham Consolidated Mining Co., et al.*, 69 Utah 423, 255 Pac. 672, where this court, speaking through Justice Straup at page 437 of the Utah Reports stated:

"Under the statute it is apparent that the power of the court to grant or refuse an application to occupy premises sought to be condemned, 'pending the action,' is, to a large extent, discretionary, de-

pending upon the showing of necessity for a speedy occupation. * * *

The same rule was announced by the Supreme Court of Colorado in *People v. District Court*, 17 Pac. 298, at page 299, as follows:

“* * * The rule granting possession pending the proceedings was discretionary, and might have been denied by the judge. In many cases instituted under this statute it is the duty of the judge to decline to enter such rule. * * *”

In the exercise of its discretion the trial court under our statute should consider the following factors:

- (1) The value of the premises sought to be condemned.
- (2) The relative damages that will accrue to the parties.
- (3) The reasons requiring a speedy occupation.

The foregoing factors mark the boundaries within which the discretion of the trial court may be exercised. A consideration of these factors conclusively shows that the trial court properly exercised its discretion in denying the motion of the Road Commission.

- (c) The Trial Court Properly Exercised Its Discretion in Denying Appellant's Motion for Immediate Occupancy.

The essential factors here in determining whether the Road Commission was entitled to immediate occupancy of

the Little Cottonwood Branch of Rio Grande are the relative damage accruing to the parties and the need for immediate occupancy. We will therefore give consideration to each of these factors.

In considering the damage which would be sustained by Rio Grande it was well recognized by court and counsel that if the court had entered the order requested, by the Road Commission, Rio Grande's Little Cottonwood Branch would have been forthwith destroyed (R. 24). The immediate effect would have been to terminate all of Rio Grande's operations upon this branch with the loss of all revenue flowing therefrom. More serious however would have been the effect on the industries served by Rio Grande on this branch. These industries are not parties to this action. They have not been served with any notice of these proceedings, yet had the court entered the order sought these parties would suddenly have found themselves without rail service. Railroads are highways, *Oregon Short Line Railroad Company v. Murray City*, 2 Utah 2d 427, 277 P. 2d 798, and upon the destruction of Rio Grande's branch of railroad this highway would instantly be closed to all such industries. At this stage of the case we have no means of knowing what the damage would be to such industries, but it may very well be substantial.

We are unable to perceive any damage which has or would result to the Road Commission in being unable immediately to seize this branch of railroad. It may very well be that the Road Commission will need to enter upon the railroad property for the purpose of making surveys, locations, maps, etc. They need not destroy the railroad in

order to do so for such right is expressly granted to them under Section 78-34-5, Utah Code Annotated, 1953, which provides as follows:

“78-34-5. Right of entry for survey and location.—In all cases where land is required for public use, the person, or his agent, in charge of such use may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this chapter. The person, or his agent, in charge of such public use may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the lands, except for injuries resulting from negligence, wantonness or malice.”

No serious contention can be made with respect to highway construction on Center Street. The work which was covered by the contract entered into in 1956 has now been completed. The further work on that street pursuant to the arrangement completed with Rio Grande and then abandoned by the Road Commission has been deferred pending the further development of the freeway project.

No evidence was offered by the Road Commission indicating any damage whatever resulting from being denied the right immediately to seize this line of railroad and we are firmly convinced that there is no damage whatever.

Turning to the need for immediate occupancy we have here a situation in which a highway is now in the planning stage. Before the plan is completed at least two problems wholly separate from the condemnation of Rio Grande's

Little Cottonwood Branch, must be solved, the one relates to the crossing of Center Street by the freeway and the other has to do with the relocation of Rio Grande's Bingham and Garfield Branch. We have no doubt that all of the problems incident to the construction of the Valley freeway will eventually be solved. We have no doubt that this freeway will be constructed. We are at a loss, however, to perceive how a project which will be in construction some three to five years in the future necessitates that the Road Commission shall today on summary procedure seize this branch of railroad.

In its brief the Road Commission states:

"* * * It will take from one to two years to fully plan the structures and the design of the highway so it is necessary to obtain immediate occupancy of the property involved in this action to accomplish the speedy construction of the highway."

Appellant does not explain why it is necessary to seize the railroad in order to plan the structures. The design or plan of structures is made in the drafting office of the project engineers, miles removed from the physical location. If any surveys are to be made upon the ground the Road Commission already has all necessary authority under said Section 78-34-5, *supra*. How then can it seriously be contended that a present seizure is necessary to engage in planning for future construction.

It seems clear to us that the legislature intended by the provisions of said Section 78-34-9 that a project must be advanced beyond the stage of planning to justify an

immediate occupation of premises. Construction must be authorized and either in progress or in preparation of immediate commencement. Counsel cite *Home Gas Company v. Kuruc*, 132 N. Y. S. 2d 316. The basis for the order of occupancy in that case is stated by the court at page 321 as follows:

“The plaintiff has applied to this Court by a separate motion, returnable June 21, 1954 for immediate temporary possession of the easement involved in these proceedings. The Court reserved decision until after the trial. It appearing to the Court from plaintiff’s moving papers and from the evidence on the trial, that the *plaintiff is now ready to commence construction, and it further appearing that the need is immediate and urgent to increase the supply of natural gas in this area at the earliest possible date*, and it appearing to the satisfaction of this Court that the public interest would be prejudiced by the delay, it is the determination of this Court, that the plaintiff should be granted immediate temporary possession of the easement which it seeks to condemn in these proceedings.”

In *Town Superintendent of Highways of Frankfurt*, 87 N. Y. S. 2d 453, likewise cited by counsel, the facts are not shown. The court at page 455 merely stated that:

“From the facts before this Court, it does appear that the public interest will be prejudiced by delay in the above matter, and the section does offer relief that would prevent the public interests from being prejudiced by such delay.”

Appellant appears to rely upon *State Road Commission v. Franklin*, 95 A. 2d 99. That case was decided, however, under constitutional and statutory provisions which ex-

pressly authorized the Road Commission to take possession of the property being condemned prior to construction. We find no provisions of our constitution or statute authorizing such procedure. The legislature may, subject to state and federal constitutional limitations, enlarge the powers of the Road Commission but until further legislative action is taken the Road Commission is restricted by the statutory provisions cited above. It should be observed further in this connection that under many of the statutes the body exercising the power of eminent domain is required upon taking immediate possession to deposit into court the estimated value of the property being condemned. In this jurisdiction, however, since the decision in *Barnes v. Wade*, 90 Utah 1, 58 P. 2d 297, the Road Commission may take immediate possession without the furnishing of bond or the depositing of any award. We would think that if the legislature saw fit to extend the powers of the Road Commission to permit immediate occupancy for the purpose of planning highways which may be constructed three to five years in the future, it would require a deposit of an award to protect the property owner against damages resulting from a dismissal of the action because of a change in plan.

Regardless of what the legislature may see fit to do for the future we submit that under the facts presented on appellant's motion and under the present statute the trial court properly denied the motion for immediate occupancy.

POINT II.

THE POWER OF APPELLANT TO CONDEMN THE PROPERTY OF RESPONDENT IS NOT

AFFECTED BY THE ORDER APPEALED
FROM.

Appellant in its second point urges that the Road Commission has a more necessary public use of the premises sought to be condemned than has Rio Grande. We are uncertain of the precise contention which appellant makes under this point. Does appellant contend that a more necessary public use *ipso facto* entitles the Road Commission to immediate occupancy. If such is the point of the contention we think it is without merit. The right of the Road Commission to obtain immediate occupancy depends, as we have shown, upon its ability to make a proper showing under the statute. Unless such a showing can be made, as the statutes now stand, the Road Commission cannot immediately occupy the premises. The trial court properly found that the evidence was insufficient to support the motion and properly denied the same.

If the appellant contends that the issue of more necessary public use was involved in or decided by the trial court in passing upon the motion for immediate occupancy, then appellant misconceives the nature of the motion for immediate occupancy and the effect of the denial of such motion.

In *Utah Copper Co. v. Montana-Bingham Consolidated Mining Co.*, *supra*, this court laid at rest the question of the nature of orders permitting immediate occupancy in condemnation cases. In that case, on motion for immediate occupancy the trial court entered an order to the effect that plaintiff had a right to condemn and to take possession

pending final determination. Upon further hearing plaintiff offered to introduce further evidence on the right to condemn. The offer was objected to and the objection sustained. Complaint was made of the ruling. In commenting on the ruling this court, at page 435 of the Utah Report, said:

“* * * It is urged by the respondent and denied by the appellant that the order granting immediate possession and occupancy was res adjudicata as to the right of the plaintiff to condemn and occupy the premises, and that the only remaining question to be determined was the amount of damages. On the contrary, the appellant contends that the order was merely interlocutory and during the pendency of the proceedings was subject to modification or to be vacated as circumstances and conditions might require, and, being interlocutory, the defendant was entitled to be further heard on the question of the plaintiff's right to condemn and take or possess the premises. We think the contention of the appellant in such respect is well founded.

* * * * *

“Under the statute it is apparent that the power of the court to grant or refuse an application to occupy premises sought to be condemned, ‘pending the action,’ is, to a large extent, discretionary, depending upon the showing of necessity for a speedy occupation. To wisely exercise the discretion the court might well require the plaintiff to make a showing, not only as to the necessity for a speedy occupation, but also a prima facie showing as to his right to condemn, if that right be controverted. It also would seem, from the language of the statute, that the plaintiff may move the court, etc., to occupy the premises sought to be condemned, ‘pending the action,’ and requiring the giving of a bond ‘to pay

all damages arising from occupation before judgment in case the premises are not condemned,' that an order permitting immediate possession 'pending the action' would be interlocutory and not final, and on the face of the order itself it appears that it permitted the possession and occupancy 'pending the action and until the further order of the court,' and thus was intended to be merely interlocutory. When the cause was finally submitted as to all of the issues, the court made findings and conclusions and rendered a decree upon all of the issues, including the questions or issues that the use of the premises applied for was a public use and authorized under the statute, that the taking was necessary for such use, and that the plaintiff was entitled to exercise the right of eminent domain. Thus, because of the statute and the nature of the orders the first granting possession pending the action and until the further order of the court and the second a perpetual occupancy, we think the first order was interlocutory and the second final. *Templeton v. District Court*, 47 Cal. 70; *People v. District Court*, 11 Colo. 147, 17 P. 298."

The trial court in the case at bar carefully avoided passing upon any question relative to the ultimate rights of the parties. It confined itself strictly to the matter which it was called upon to decide under the motion, namely, whether at that stage of the proceedings the Road Commission was entitled to occupy Rio Grande's branch of railroad. Under the rule announced in the *Utah Copper Company* case, *supra*, the order of the court denying the motion is merely interlocutory. It in no way impairs or affects the ultimate rights of the parties which must be determined upon the trial of the case.

Due process of law and orderly judicial procedure require that the proceedings go forward for trial at which both parties may have an opportunity to offer evidence and be fully heard on every issue which may require a determination on the merits. If on the evidence presented at such trial there is an issue on the question of a more necessary public use or the power of appellant to condemn the property in question the trial court can and will on the evidence then before it determine any such issues. No such issues were considered by the trial court on the motion and none are before this court on this appeal. Until any such issues are properly presented, heard and decided any rights which appellant may have are in no manner impaired or affected by the interlocutory order now appealed from. It therefore becomes unnecessary to consider the cases cited by appellant on its second point.

CONCLUSION

We are concerned here only with the question of whether the trial court abused its discretion in denying appellant's motion for immediate occupation of respondent's Little Cottonwood Branch of railroad. There was no actual showing at the hearing on such motion of a need for a present occupation of such railroad. The substance of appellant's contention is that the issuance of the order for immediate occupancy is necessary to *plan* a highway to be constructed in the future. Our statute permits the issuance of such an order only in cases where a need for an actual speedy occupation is shown. The motion was therefore properly denied. The order is interlocutory only. It in no manner affects or impairs the ultimate rights of the parties. These are preserved pending a determination by the trial court upon the merits.

The order of the trial court should therefore be affirmed.

Respectfully submitted,

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